

11.4
: April 19, 1983

: Director, Indian Health Service

RFO: 83-4

: Request for Opinion 83-4: Lease of Administrative Space under Section 704 of P.L. 94-437

: OGC/BAL
Attn: Skip Mancuso

Section 704 of P.L. 94-437 provides authority to enter into leases with Indian tribes for up to 20 years to carry out the purposes of the Act.

Attached at Tab A are copies of memos from John Shopteese, IHS Real Property Officer, raising the question of whether Section 704 of P.L. 94-437 authorizes lease of administrative space from Indian tribes.

This same information has already been informally transmitted to Skip Mancuso of your office (See Tab B).

Previous Office of the General Counsel (OGC) opinions have noted that although Section 704 of P.L. 94-437 is limited by the phrase "in carrying out the purposes of this Act" (See opinion dated 4/19/79 at Tab C), lease of related support facilities such as staff housing are not precluded (See opinion dated 5/17/82 at Tab D).

While the question of what else properly constitutes related support facilities to carry out the purposes of P.L. 94-437 apparently has not yet been addressed by OGC, it is the Indian Health Service (IHS) view that the term "for purposes of this Act" in Section 704 includes administrative space needed to support the IHS health care responsibilities to Indian people.

We would appreciate your expeditious review of this subject as the leases in question expire as early as May 4, 1983. It is our understanding that if the leases cannot be renewed under Sec. 704, GSA would be responsible for obtaining the required space on the open market which would involve IHS relocation out of the current Pueblo space.

(Sgd.) John G. Todd, Dr. P.H.

Everett R. Rhoades, M.D.
Assistant Surgeon General

Attachments:

Tab A - Copies of memos from John Shopteese, IHS Real Property Officer
Tab B - Information transmitted to Skip Mancuso
Tab C - Opinion dated 4/19/79
Tab D - Opinion dated 5/17/82

RECEIVED

APR 25 1983

Facilities Management
Branch, FEMO

Ms. Eleanor Matney, PHS
Mr. J. J. OGC/PHD
Mr. S. J. J. Deputy ADA
Mr. Davidson, Albuquerque Area IHS

cc: Mr. Shopteese, Albuquerque Area IHS
Mr. Glynn Corry, OS
Mr. Skip Mancuso, OGC/BAL
Mr. I.K. Burgess, PHS

File

APR 8 1983

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Assistant Surgeon General

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Prepared by: IHS/OLRS:LMorris:ljt:4/13/83:443-1116:1420L

MS. Eleanor Martinez
Mr. M. J. G. GGC/PHD
Mr. S. J. G. Deputy ADA
Mr. Davidson, Albuquerque Area IHS
Mr. Shopteese, Albuquerque Area IHS
Mr. Glynn Corry, OS
Mr. Skip Mancuso, OGC/BAL
Mr. I.K. Burgess, PHS

memorandum

DATE: November 30, 1982

REPLY TO
ATTN OF: Real Property Officer, FMB - FEMOSUBJECT: Executive Order 12348, Payment for Transfer of Excess
Real Property to Other AgenciesTO:
Associate Director for Administration

Attn: Office of Legislation

Thru: Chief, Facility Management Branch
Facility & Equipment Management Office

The Real Property Review Board (PRB), established by the subject Executive Order, established a policy that real property transferred between Federal Departments and Agencies will require payment by the receiving Department or Agency of 100 percent of the Fair Market Value (FMV) of the property.

Any deviation from this policy may be allowed only after certification by the Secretary as to need for such deviation and that payment of less than 100 percent FMV would not be counter to the objectives of Executive Order 12348. The unavailability of funds alone is not sufficient to justify an exception.

The Executive Order primarily mandates the continuing utilization of all facilities to the maximum by Federal Agencies.

The policy of the PRB causes some concerns on the impact of existing authorities, Public Laws, and IHS Legislative policies as to program use of IHS facilities in providing medical services and program functions. Although some facilities are not directly used 100 percent by IHS, Legislation as PL 93-638 may permit Tribal entities to carry out such functions in performance of contracts and/or grants of IHS Programs, while occupying such Federal facilities.

On replacement of older hospitals with new Federal or Tribally constructed facilities, IHS has previously retransferred existing old facilities back to the Bureau of Indian Affairs in accordance with the "Memorandum of Understanding" between BIA and IHS. If tribes had interest in the old facility, the Bureau would simply hold the property in trust for the tribes for their use. We are verbally informed that such transfer must now be in conformance with E.O. 12348, indicating that BIA must now reimburse IHS the Fair Market Value of facilities so transferred.

Although such transfer would be supported by appropriate documentation for the deviation provisions of the E.O. on a case by case basis, it would save time, manpower, and indirect cost if IHS is recognized with the "Memorandum of Understanding" exception and other existing authorities in such actions, or provided a "blanket waiver" if such facilities would be for use by tribes in carrying out functions of IHS as indicated by PL 93-638.

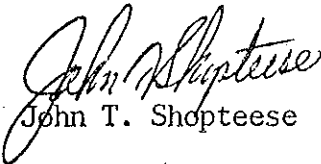
In certain situations, other legislation provides exceptions to the Federal Regulations as P.L. 93-599, which amended the Federal Property and Administrative Services Act of 1949, to provide for disposal of certain excess facilities directly to the Secretary of Interior, to be held in trust for Tribal use. There are conditions, of course, with which these exceptional provisions apply and which IHS takes into consideration while maintaining compliance of other authorities as the Memorandum of Understanding.

In view of Executive Order 12348, establishing the Real Property Review Board policies as to utilization and excessing real estate within which IHS is the controlling Agency, and the requirement of the Secretary's concurrence of such action, would it be within program consideration for an IHS waiver to such provisions which, as we interpret, supercede conveyence procedures such as:

- A. Transfer real property to and from the Bureau of Indian Affairs (Memorandum of Understanding), Delegations of Authority, No. 396 of May 3, 1961, (26 F.R. 4029) as set forth in FPMR 101-47.604.
- B. P.L. 93-599 - Facilities transferred to the Department of the Interior in accordance with Section 202(a)(2) Federal Property and Administrative Services Act of 1949, to be held in trust for an Indian Tribe. FEC Manual HHS CH 3-355, HHS Transmittal 81, (CH 3-370 - Sec. 20).
- C. P.L. 93-638, Sec. 106 (e) permits Tribal organizations to utilize Federal facilities in carrying out such functions related to a contract or grant. In such case, a report of 100 percent use of an old hospital and IHS program may not be directly in use by IHS staff, but the facility is indirectly in use for program functions through such grant or contract.
- D. P.L. 94-437, Sec. 704, permits direct leasing with Tribal entities up to 20 years at the discretion of the Secretary. Under this provision, several clinics are leased from Tribal governing bodies in isolated locations where clinical functions may be limited to one or two days per week. This is not an indication that such a facility is underutilized but while in actual occupancy, is used 100 percent. The need to retain this type of leased occupancy is necessary to reach the otherwise isolated communities which cannot travel to existing hospitals or clinics which are in full-time operation.

We would appreciate an opinion as to the interpretation of Executive Order 12348 and the policies of the Real Property Review Board as they apply to the above existing policies, and if in fact, they have been superceded by such implementation.

Your earliest consideration would be appreciated.


John T. Shopteese

Attachments

cc: Director, Indian Health Service
Richard McCloskey, Director
Office of Legislation & Regulations, Rm 6A-20
Director, Division of Health Facilities & Planning
HRSA, Rm 18-42

Washington, D.C. 20201

ROFEC DIRECTIVE 3-34

DATE : August 31, 1982

MEMORANDUM TO: Directors, RASC I-X
Attention: Directors, ROFEC

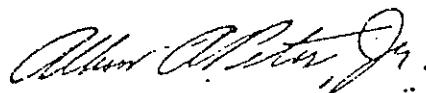
FROM : Director
Office of Facilities Engineering

SUBJECT : Acquisition of Realty by Transfer from Other
Federal Agencies

The Property Review Board (PRB), established by Executive Order 12348, has established a policy that realty transferred between Federal Departments and Agencies will require payment by the receiving Department or Agency of 100 percent of the fair market value (FMV) of the property.

Any deviation from this policy may be allowed only after certification by the Secretary as to need for the deviation and that payment of less than 100 percent FMV would not be counter to the objectives of the Executive Order. Documentation submitted to OFE in support of any Form GSA 1334, Request for Transfer of Real Property, where property is requested at less than 100 percent FMV must be accompanied by a draft Secretarial decision memorandum covering the above points.

Copies of the Executive Order and the PRB policy memorandum are attached.


Albert A. Peter, Jr.

Attachments 2

cc: Anthony Itteilag, ASMB
Wilford Forbush, PHS
I. K. Burgess, PHS
Richard Rohde, HCFA
Joseph Mottola, OHDS
Nelson J. Sabatini, SSA

THE WHITE HOUSE
WASHINGTON

June 2, 1982

JUN 3 1 28 PM '82

MEMORANDUM FOR GERALD P. CARMEN
ADMINISTRATOR OF GENERAL SERVICES

DAVID A. STOCKMAN
DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

FROM:

EDWIN L. HARPER
CHAIRMAN, PROPERTY REVIEW BOARD

SUBJECT: Transfers of Excess Federal Property

Executive Order 12343 established the Property Review Board (PRB) to oversee the President's program to improve the management of Federal real property. The Office of Management and Budget has decided with the Administrator of GSA that property excessed by a Federal agency should be transferred to another Federal agency only upon payment of the full fair market value for the property.

To implement this policy, the Board is providing the following guidance:

1. Any exception to this policy must be endorsed by the head of the executive department or agency. The unavailability of funds alone is not sufficient to justify an exception.
2. The request for exception should be submitted to GSA for referral to the Director of OMB, and include an explanation of how the exception would further essential agency program objectives and at the same time be consistent with Executive Order 12343.
3. If the Director of OMB approves the exception, the Administrator of GSA shall be notified and may then complete the transfer. A copy of the OMB approval should be sent to the PRB.
4. The agency requesting the exception should assume responsibility for protection and maintenance costs where the disposal of the property is deferred for more than 30 days because of the consideration of the exception.

cc: Heads of All Executive Departments and Agencies

Subject: TRANSFER OF IHS REAL PROPERTY TO THE DEPARTMENT OF THE INTERIOR, BIA

3-370-00 Purpose
10 Background
20 Authorities and Guidelines

RECEIVED
06 APR 1981
Administrative
Officer, FEMO

3-370-00 PURPOSE

This chapter prescribes authorities guidelines and procedures pertaining to the transfer of excess Indian Health Service (IHS) real property.

3-370-10 BACKGROUND

The basic authority of IHS stems from the so-called Indian Transfer Act, P.L. 83-568 of August 5, 1954, which transferred Indian Health functions from the Bureau of Indian Affairs of the Department of the Interior (BIA), to the Public Health Service (PHS). Under section 4 of that Act, the properties of BIA relating primarily to health matters were authorized to be transferred to PHS subject to the approval of the then Director of the Bureau of the Budget. If trust properties are involved, the transferee agency assumes the trust obligation with respect to the Indian Tribes. In recognition of the fact that adjustments would from time to time be called for in the respective real property holdings for the benefit of Indian Tribes, and in order to simplify transfer procedures, a Memorandum of Understanding was entered into in 1961 among the Secretary of the Interior, the Secretary of Health, Education, and Welfare, and the Administrator of General Services to cover such transfers as well as retransfers of property between the two Departments involved. See Exhibit 3-370-A. Delegations of Authority No. 396 of May 3, 1961 (26 F.R. 4029) implemented that Memorandum of Understanding by authorizing the two Secretaries "to transfer and to retransfer to each other, upon request, any of the property of either agency which is being used and will continue to be used in the administration of any function relating to Indians." Transfers under that Delegation of Authority, which appears in the FMPR's at 41 CFR 101-47.604, do not require any screening of other agencies. It is in effect except to the extent that it may have been superseded by Section 202(a)(2) of the Federal Property and Administrative Services Act of 1949, which was added by P.L. 93-599, approved January 2, 1975.

The new section 202(a)(2) of the Federal Property and Administrative Services Act of 1949 provides for the transfer, without compensation, of certain excess real property to BIA to be held in trust status under BIA in favor of the Indian Tribes within whose boundaries such excess property is located or, in Oklahoma, within a former Indian reservation or contiguous to real property now held in trust for an Indian Tribe but only if the property itself was once held in trust by the United States for an Indian Tribe. No regulations have been issued by GSA with respect to the new section 202(a)(2).

Presidential Documents

Federal Register
Vol. 47, No. 47
Monday, March 1, 1982

Title 2--

The President

Executive Order 12688 of February 24, 1982

Federal Real Property

By virtue of the authority vested in me as President by the Constitution and the laws of the United States of America, including Section 552(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 552(a)), in order to improve management of Federal real property, it is hereby ordered as follows:

Section 1. (a) There is hereby established a Property Review Board.

(b) The members of the Board shall be the Counselor to the President, Director, Office of Management and Budget, Chairman, Council of Economic Advisors, Assistant to the President for Policy Development, Chief of Staff, and Assistant to the President for National Security. The President may from time to time designate, One of the members of the Board shall be designated by the President as Chairman.

(c) Staff, including an Executive Director, and other administrative support shall be provided from resources available to the President.

Sec. 2. The Board shall perform such functions as may be directed by the President, including the following:

- (a) develop and review Federal real property acquisition, utilization, and disposal policies with respect to their relationship to other Federal policies;
- (b) advise the Administrator of General Services with respect to such standards and procedures for executive agencies that are necessary to ensure that real property holdings no longer needed to their activities and responsibilities are promptly identified and released for appropriate disposition;
- (c) review and examine prior disposals of surplus property for public benefit, discount conveyances to ensure that the property is being used and maintained for the purposes for which it was conveyed;
- (d) receive the surveys and reports made by or to the Administrator of General Services pursuant to Sections 2 and 4 of this Order as well as other reports on Federal real property that are requested by the Board, with particular attention to resolution of conflicting claims on, and alternate uses for, any property described in those reports, consistent with laws governing Federal real property;
- (e) provide guidance to the Administrator of General Services in accord with Section 6 of this Order;
- (f) initiate for each Executive agency annually the target amount of its real property holdings to be identified as excess and
- (g) submit such recommendations and reports to the President as may be appropriate.

Sec. 3. (a) All Executive agencies shall periodically review their real property holdings and conduct surveys of such property in accordance with standards and procedures determined by the Administrator of General Services pursuant to Section 203 of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 427), and this Order.

(b) The head of each Executive agency, within 90 days of the date of this Order, shall report to the Administrator of General Services and the Board the agency's real property holdings which, in his judgment, are not utilized, are underutilized, or are not being put to optimum use.

(c) The head of each Executive agency shall identify, and report to the Board all those properties which can be considered for disposition in response to the targets established by the Board in subsection 2(f) of this Order.

Sec. 4. The Administrator of General Services in consultation with the Board shall issue standards and procedures, conduct surveys and cause surveys to be conducted, to ensure that the real property holdings of Executive agencies shall continually be evaluated with special emphasis on the identification of properties that are not utilized, are underutilized, or are not being put to optimum use. The Administrator shall consult with the Board and appropriate Executive agencies in order to (i) identify real property that is excess or surplus to the needs of the Executive agencies, and (ii) make such real property available for its most beneficial use under the various laws of the United States affecting such property.

Sec. 5. The Administrator of General Services shall report to the Board with respect to any property or portion thereof which has not been reported excess to the requirements of the holding agency and which, in the judgment of the Administrator, is not utilized, is underutilized, or is not being put to optimum use, and which he recommends should be reported as excess property.

Sec. 6. Before the Administrator of General Services assigns or conveys property for public benefit discount conveyances, he shall first consult with the Board and consider such guidance as it may provide.

Sec. 7. The Administrator of General Services shall, to the extent permitted by law, provide necessary advice and assistance to the Board to accomplish the objectives of this Order.

Sec. 8. Executive Order No. 11864, as amended, is revoked.

Ronald Reagan

THE WHITE HOUSE
February 24, 1982

3-370-20 AUTHORITIES AND GUIDELINES

- A. Section 202(a)(2) of the Federal Property and Administrative Services Act applies only to real property that is not held in trust for an Indian Tribe. Transfers thereunder are made for the benefit of Indian Tribes. The property so transferred may be used by Indian Tribes themselves or by BIA for administration purposes for the benefit of Indian Tribes. BIA always assumes a trust obligation in favor of Indian Tribes for property so transferred. Section 202(a)(2) does not call for any reimbursement to the transferring agency. Property already held by IHS in trust for an Indian Tribe is not subject to section 202(a)(2) but may be transferred to BIA pursuant to Delegation of Authority No. 396, or, if outside that Delegation, under excess property procedures. In the absence of a FPMR specifically applicable to transfers under section 202(a)(2), SF 118 (report of excess) should be used and the applicability of that section demonstrated by indicating:
1. The name of the Indian Reservation within which the property is located and the fact that the Indian Tribe occupying the reservation is recognized by the Bureau of Indian Affairs; or
 2. if the property is within Oklahoma, the fact that it is within the boundaries of a former Indian Reservation and was held in trust for an Indian Tribe at the time of its acquisition by the United States, or is contiguous to property now held in trust for an Oklahoma Indian Tribe and was itself at one time held in trust by the United States for an Indian Tribe.
- B. Delegation of Authority No. 396 applies to properties held in trust by IHS for Indian Tribes when it desires to transfer the trust to BIA and it also applies to IHS non trust properties, such as properties acquired by IHS by purchase, and intended to be transferred to and used by BIA for Administrative purposes for the benefit of Indian Tribes. Such transfers must:
1. Comprise a functional unit and be within the United States, and
 2. have had an acquisition cost of \$100,000 or less, and
 3. not be located in an urban area or place under the most recent decennial census.
- C. Transfers of excess property should first be tested to see whether the property is in a status such as to make P.L. 93-599 applicable. If not, the provisions of FPMR 101-47.604 may, if appropriate, be followed. Normal excess property procedures are to be used in those cases that do not meet the conditions of A. and B. above (see chapter 3-555).

Memorandum of Understanding

MEMORANDUM OF UNDERSTANDING BETWEEN THE SECRETARY OF THE INTERIOR, THE
SECRETARY OF HEALTH, EDUCATION, AND WELFARE AND THE ADMINISTRATOR OF
GENERAL SERVICES COVERING TRANSFERS AND RETRANSFERS OF CERTAIN REAL
PROPERTY AND RELATED PERSONAL PROPERTY BETWEEN THE BUREAU OF INDIAN
AFFAIRS AND THE PUBLIC HEALTH SERVICE

- I. PURPOSE. This Memorandum of Understanding is to establish a working agreement between the Secretary of the Interior, the Secretary of Health, Education, and Welfare, and the Administrator of General Services to simplify procedures for transfers and retransfers between the Bureau of Indian Affairs, Department of the Interior, and the Public Health Service, Department of Health, Education, and Welfare of real property and related personal property which is being used and will continue to be used in the administration of their respective functions relating to the Indians (hereinafter called the "Property").
- II. BACKGROUND. The Act of August 5, 1954 (68 Stat. 674) provides, in part, that all functions, responsibilities, authorities, and duties of the Department of the Interior, the Bureau of Indian Affairs, Secretary of the Interior, and the Commissioner of Indian Affairs relating to the maintenance and operation of hospital and health facilities for Indians, and the conservation of the health of Indians, are transferred to, and shall be administered by, the Surgeon General of the United States Public Health Service, under the supervision and direction of the Secretary of Health, Education, and Welfare. The two departments now work in close cooperation in the administration of their respective functions relating to the Indians, including functions relating to the maintenance and operation of hospital and health facilities. In many instances, Property no longer required by one department could be immediately placed in productive use by the other. Direct authority to transfer or retransfer Property no longer needed by one department and required by the other would contribute to effective administration of an Indian program; would simplify transfer procedures; and would achieve beneficial results to the departments and Indian tribes involved. The Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended, contains such authority, which can be delegated.
- III. SCOPE. The provisions of this Memorandum of Understanding are applicable to each transfer or retransfer of Property which comprises a functional unit, which is located within the United States, and which has an acquisition cost of \$100,000 or less: Provided, however, That the transfer or retransfer shall not include Property situated in any area which is recognized as an urban area or place for the purpose of the most recent decennial census.

TRANSFER OF IHS REAL PROPERTY TO
BIA, DEPARTMENT OF THE INTERIOR

Memorandum of Understanding

IV. PROCEDURE.

- a. Upon agreement between the Secretary of the Interior and the Secretary of Health, Education, and Welfare that Property no longer needed by one department is required by the other, the department having control of the Property shall prepare a "Report of Excess Real Property," Standard Form 118, with appropriate schedules. There shall be stated on the Standard Form 118 under "Remarks" that the Property is subject to transfer or retransfer under the provisions of this Memorandum of Understanding, and the Delegation of Authority from the Administrator of General Services referred to in Part V hereof, identifying this Memorandum of Understanding by the date thereof and the Delegation of Authority by the number and date thereof.
- b. Transfer or retransfer of the Property, including the custody thereof and accountability therefor, shall be at the time and place agreeable to each department, and, upon completion thereof, an endorsement shall be made on the Standard Form 118 showing the date and hour such transfer or retransfer occurred.
- c. Any such transfer or retransfer of a specific Property shall be without reimbursement except:
 - (1) Where funds programed and appropriated for acquisition of the Property are available to the Secretary requesting the transfer or retransfer; or
 - (2) Whenever reimbursement at fair value is required by GSA Reg. 2-IV-202.07a.
- d. Where funds were not programed and appropriated for acquisition of the Property, the Secretary requesting the transfer or retransfer shall so certify on Standard Form 118. Any determination necessary to carry out the provisions of this Memorandum of Understanding which is required under GSA Reg. 2-IV-202.07, to be made by the General Services Administration shall be made by the Secretary transferring or retransferring the Property and any such determination shall be endorsed on Standard Form 118.
- e. Upon completion of a transfer or retransfer, the Secretary making the transfer shall forward the original Standard Form 118 to the Secretary to whom the Property is transferred, as evidence of the transfer, and four conformed copies of the completed Standard Form 118 to the regional office of GSA which serves the area in which the Property is located.

Memorandum of Understanding

- f. Whenever the acquisition cost of any Property transferred or retransferred without reimbursement is more than \$10,000, GSA shall report the transaction to the Director of the Bureau of the Budget and shall submit a conformed copy of the Standard Form 118 with such report.
- V. DELEGATION OF AUTHORITY. This Memorandum of Understanding will become effective upon the date of execution by the Administrator of General Services of a Delegation of Authority to the same effect as the attached draft of delegation.

L. E. Beasley
Administrative Assistant
Secretary of the Interior

Date MAR - 3 1961

R. E. Miles Jr.
Administrative Assistant
Secretary of Health, Education,
and Welfare

Date MAR 16 1961

John L. Moore
Administrator of General Services
Date MAY 3 1961



Public Law 93-599
93rd Congress, H. R. 8958
January 2, 1975

An Act

To amend the Federal Property and Administrative Services Act of 1949 to provide for the disposal of certain excess and surplus Federal property to the Secretary of the Interior for the benefit of any group, band, or tribe of Indians.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 202(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483(a)) is amended as follows:

(1) The first sentence of such subsection is amended by striking out "In" at the beginning of such sentence and inserting in lieu thereof: "(1) Subject to the provisions of paragraph (2) of this subsection, in".

(2) Such subsection is amended by adding at the end thereof the following new paragraph:

"(2) The Administrator shall prescribe such procedures as may be necessary in order to transfer without compensation to the Secretary of the Interior excess real property located within the reservation of any group, band, or tribe of Indians which is recognized as eligible for services by the Bureau of Indian Affairs. Such excess real property shall be held in trust by the Secretary for the benefit and use of the group, band, or tribe of Indians, within whose reservation such excess real property is located: *Provided*, That such transfers of real property within the State of Oklahoma shall be made to the Secretary of the Interior to be held in trust for Oklahoma Indian tribes recognized by the Secretary of the Interior when such real property (1) is located within boundaries of former reservations in Oklahoma as defined by the Secretary of Interior and when such real property was held in trust by the United States for an Indian tribe at the time of acquisition by the United States, or (2) is contiguous to real property presently held in trust by the United States for an Oklahoma Indian tribe and was at any time held in trust by the United States for an Indian tribe."

Approved January 2, 1975.

Indian reser-
vations.
Excess prop-
erty, dis-
posal.

89 STAT. 1954
98 STAT. 1355

LEGISLATIVE HISTORY:

HOUSE REPORT No. 93-1339 (Comm. on Government Operations).
SENATE REPORT No. 93-1324 (Comm. on Government Operations).
CONGRESSIONAL RECORD, Vol. 120 (1974):

Nov. 18, considered and passed House.
Dec. 12, considered and passed Senate, amended.
Dec. 16, House concurred in Senate amendment with an amendment.
Dec. 18, Senate concurred in House amendment.



28 MAR 1983

NOTE TO SKIP MANCUSO

Attached are copies of memos where John Shoptese, IHS Albuquerque has, in effect, asked:

- o Can IHS extend the "P.L. 94-437" lease it has on its Albuquerque "Headquarters West" office space? (Section 704, P.L. 94-437 authorizes lease of space from Indians to provide health care to Indians.) The basic question seems to be, does management of and administrative support to Indian health care programs qualify as Indian health care under the law? (Shoptese memo of January 28, 1983)
- o Does policy set by the Property Review Board (which was established by Executive Order) take precedence over the provisions of applicable sections of currently effective law, i.e., P.L. 93-599; 93-638; 94-437, etc. (Shoptese memo of November 30, 1982)

John has asked his headquarters for opinion; we have not heard directly from IHS; PHS has not heard either, nor has ROFEC VI.

The purpose of this note is to alert you to the question should they be brought to you and/or your colleagues officially.

100 Sp
b7c
(P)
Unofficially, Region VI ROFEC has visited Albuquerque since John's memo, inspected the space in question and feels nearly all of it (90% or more) is being used for actual delivery of health care services. Regardless of that, GSA assigned space would be easy to find in today's market. In fact, enough is available now to handle IHS' relocation out of the Pueblo Cultural Center space, should that be necessary. Otherwise, Region VI plans to mark time until IHS finalizes its ongoing reorganization planning. After then, its space needs may be drastically different.

Could we discuss this question more at your convenience?


Glynn Corry

Attachments

cc--I. K. Burgess, PHS

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY

TO : Richard McCloskey, Director
Office of Legislation & Regulations
Service

DATE: APR 19 1979

FROM : Henry H. Pike, Special Assistant
Business and Administrative Law Division

Henry H. Pike

SUBJECT: Leases with Indian Tribes under Section 704 of P L. 94-437

By memorandum dated February 7, 1979, to Duke McCloud, who referred it to me, you inquired whether section 704 of the Indian Health Care Improvement Act (P.L. 94-437) provides authority for the leasing of property to Indian tribes in addition to authority to lease property from Indian tribes. Section 704 provides as follows:

Sec. 704. Notwithstanding any other provision of law, the Secretary [of Health, Education, and Welfare] is authorized, in carrying out the purposes of this Act, to enter into leases with Indian tribes for periods not in excess of twenty years.

That provision of law fails to specify whether it applies to the Secretary as the lessor or as the lessee. The result is an ambiguity, which is so common an ambiguity that for purposes of distinguishing between them a lease from the Government as lessor is often informally referred to as an out-lease, and a lease to the Government as lessee is informally referred to as an in-lease. That ambiguity was not cleared up by the Congressional Committee Reports, although the examples cited therein clearly refer to leases to the Government. In-leases are subject to the provisions of section 322 of the Economy Act (40 U.S.C. 278a), which prescribe a maximum rental price in terms of the fair market value of the premises. Out-leases are much less common but are not unknown. They are subject to the provisions of section 321 of the Economy Act (40 U.S.C. 303b), which section is not, of itself, authority for making out- leases. That section provides as follow:

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Page 2 -- Richard McCloskey

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Second, section 321 of the Economy Act specifically prohibits the Indian tribe from undertaking to alter, repair, or improve the leased premises as a part of the consideration for its use and occupancy thereof. While this does not preclude the Indian tribe from gratuitously improving the premises, it is difficult in the normal case to see how the leasing to the Indian tribe of property that requires improvements before it can be used can be said to carry out the purposes of the Act. This would be especially apparent in the case of unimproved land. Note that any improvements to the land gratuitously added by the Indian tribe would at the end of the lease term become the property of the Federal Government, subject to any right that may be included in the lease terms for removal thereof by the Indian tribe. In the normal case it may be difficult to avoid the implication that the renting of property needing improvements is really an attempt to circumvent the limitation specified in section 321 of the Economy Act, which is not affected by section 704 of P.L. 94-437.

No opinion is expressed on the case prompting your inquiry inasmuch as, as you state, it is not clear whether the property in question is held by IHS. It is noted, however, that section 4(d) of the Indian Health Care Improvement Act specifically defines an "Indian tribe" to include an Alaska native village.

cc: Duke McCloud
Ian K. Burgess
Glynn Corry
Stephanie Weldon
Jim Miles, Region X

MAY 17 1982

Office of the Regional Attorney
Chicago, Illinois

Our Ref: GC:RA:V
RASC 82/19

Red Lake Housing Lease - MEM-6-003

Donald D. Boyle
Director, ROFEC
Region V

This is with reference to your April 1, 1982 memorandum pertaining to the Indian Health Service lease of 39 housing units from the Red Lake Band of Chippewa Indians at Red Lake, Minnesota.

Red Lake is a Federal Indian Reservation established by the treaties of October 2, 1863 (13 Stat. 657) and April 12, 1864 (13 Stat. 689), and the Act of January 14, 1889 (25 Stat. 642). Sections 16 and 17 of the Indian Reorganization Act of 1934, 25 U.S.C.A. 5476-477, gave Indian tribes the authority to enter into leases up to ten years upon the approval of the tribe. The Red Lake Band of Chippewa Indians voted to accept the provisions of the Indian Reorganization Act within two years after its passage. 1/

Pursuant to the Indian Self-Determination and Education Assistance Act (P.L. 93-638), the Secretary of Health, Education and Welfare entered into a contract for the construction of 39 housing units on the Red Lake Reservation for IHS hospital personnel at a cost of \$2,400,000. Pursuant to Sections 16 and 17 of the Indian Reorganization Act of 1934, supra, and the Indian Health Care Improvement Act (P.L. 94-437), the Tribe requested the Indian Health Service to enter into a lease for the units. Congress found in Section 2(e) of the Act, 25 U.S.C.A. 51601(f)(4), that improvement of Indian health was imperiled by "related support factors" and cited as an example that "over seven hundred housing units are needed for staff at remote Service facilities." Section 704 of P.L. 94-437, 25 U.S.C.A. 51674, provides:

Notwithstanding any other provision of law, the Secretary is authorized, in carrying out the purposes of this Act, to enter into leases with Indian tribes for periods not in excess of twenty years. 2/

1/ This information was furnished by Patricia Simmons, Tribal Relations Specialist, Division of Tribal Government Services, Bureau of Indian Affairs, Department of Interior, Washington, D.C.

2/ Section 6(a) of Public Law 94-637 added a provision to 25 U.S.C.A. 51674 that property leased by the Secretary from an Indian tribe may be reconstructed or renovated by the Secretary pursuant to an agreement with such Indian tribe.

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Donald D. Boyle
Director, ROFEC
Region V

This section is the legal basis for entering into leases for staff housing under section 301(b)(3) of the WCA, 25 U.S.C.A. §1631(b)(3).

The Indian Health Service leased the housing units from December 15, 1980 to June 15, 1981, with an option for a six-month extension upon 30 days notice prior to the end of the original lease term for "a nominal payment of \$1.00 per year." Paragraph 6F of the lease stated that the "Government shall provide all maintenance, repair and upkeep of buildings and property." A lease renewal notice to extend the lease was not issued by your office until July 29, 1981. The Tribe had presented a proposed lease to the Indian Health Service which was forwarded to your office on July 1, 1981, but was unsatisfactory. Negotiations continued until February 4, 1982 when your office reached a tentative agreement for an annual rental of \$108,545 retroactive to December 18, 1981 subject to Indian Health Service concurrence.

On February 24, 1982, the Red Lake Band of Chippewa Indians passed a resolution stating, in part:

"BE IT FURTHER RESOLVED, that the Indian Health Service pay to the Red Lake Band of Chippewa Indians all monies collected for rent from June 16, 1981 to December 18, 1981 for the time that these facilities were used without any proper authorization from the Tribe.

Your office indicated that the Indian Health Service has picked up all costs related to the property from June 16, 1981 to December 18, 1981 except for one individual responsible for checking renters in and out. However, the proposed new lease was negotiated with the provision that the Tribe will do all the maintenance and management work. We understand that the Tribe has already paid the \$18,653 insurance premium.

The initial question is whether there is any legal liability for the period June 16, 1981 through December 15, 1981, and, if so, the amount of such liability. That determination depends, in part, on what law is applicable. The question of the appropriate law to be applied was addressed in United States v. Forness, 125 F.2d 923 (2nd Cir., 1942), cert. den., City of Salamanca v. United States, 62 S. Ct. 1293, 316 U.S. 694 (1942), a case involving a suit by the United States on behalf of the Seneca Nation of Indians to enforce the Nation's cancellation of a lease for nonpayment of rent upon lands in the City of Salamanca, New York. The Court stated at 125 F.2d 932 that state law "cannot be invoked to limit the rights in lands granted by the United States to the Indians because . . . state law does not apply to the Indians except so far as the United States has given its consent." The court determined that it must

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Donald B. Boyle
Director, ROFEC
Region V

look to the "common law" for a determination of the dispute and in so doing applied the legal rules as to landlord and tenant which comported with the Congressional intent concerning the Seneca Nation. Id. 125 F.2d at 937, 938.

In the absence of a statute to the contrary, a presumption generally arises that a holding over by a tenant effects a renewal of the lease as to the tenant on the same terms as the original lease. 510 C.J.S. Landlord and Tenant, §73 (1969). Unless otherwise provided by statute, where a tenant under a lease for a definite term holds over his term without a new agreement, the landlord may either treat him as a tenant or turn him out as a trespasser. C. Moynihan, Introduction to the Law of Real Property (1962). Here, the Tribe clearly treated the Indian Health Service as a tenant. The action of the Tribe constituted a renewal of the lease from June 16, 1981 through December 15, 1981 on the same terms as the original lease from December 15, 1980 to June 15, 1981. Thus, we conclude that the Government is liable for six months rent or fifty cents of the annual dollar rental charge.

A second question that should be considered is what extra-legal factors, if any, should be taken into account when ascertaining the amount to be paid to the Tribe for the six-month period beginning June 16, 1981. The Court in Forness at 125 F.2d 941 noted that "the dealings of certain of our citizens with the Indians have often been far from praiseworthy" and "federal courts usually, unless precluded by complete want of power, have done what they could to prevent unfairness to Indians." Of course, the Indian Health Service would want to avoid a public outcry similar to that emanating from the purchase of Manhattan Island from the Indians in 1625 for trinkets valued at \$24.

There are statutory, regulatory, and agency guidelines governing a contracting officer's responsibilities in negotiating leases. It is the contracting officer's duty to "acquire property and services . . . at the lowest reasonable cost" while "promoting fair dealing and equitable relationships among the parties in Government contracting." 41 U.S.C. §401(2), (12). When negotiating a lease, the contracting officer should acquire space "on the basis most favorable to the Government, with due consideration to maintenance and operational efficiency, and only at charges consistent with prevailing scales in the community for comparable facilities." 41 C.F.R. §101-18.100(b) (1981). The GSA Handbook, Acquisition of Leasehold Interests in Real Property (PSSP 1600.1), summarizes the permissible rentals for property leased by the Government. Cf. RA VIII (Knoll) to ROFEC (here), Leasing and Bonding HHS Projects, 5/7/77. However, the Regulations state that even a total rental of \$1.00 per year can legally be negotiated if it can be determined that such a price is fair and reasonable. See 41 C.F.R. 101-18.100(a) (1981).

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Donald D. Boyle
Director, ROFEC
Region V

A number of factors appear relevant in your determination of whether to pay the Tribe a sum in excess of fifty cents for the period June 16, 1981 through December 15, 1981. The Indian Health Service absorbed all costs related to the property except for an individual responsible for checking renters in and out. The lease specified that the Government was to provide all maintenance, repair, and upkeep of the buildings and property. Although the rent was increased from \$1.00 to \$108,545 per year, the increase reflects the Tribe's agreement to provide the maintenance, repair, and upkeep of the buildings and property. Moreover, the entire project was for the sole benefit of improving Indian health and not providing a windfall rental profit to the Tribe. Accordingly, we suggest that it would be fair to pay an additional rental for the June 16 - December 15, 1981 period that would cover the fair and reasonable cost of the individual responsible for checking renters in and out.

If you have any questions or we can be of any additional assistance, please contact us.

Donna Morros Weinstein
Regional Attorney

By
Edward L. Koven
Assistant Regional Attorney

BCC: 2 - GC(BAL) Div. /
2 - GC(PHS) Div. /
Attn: Duke McCloud

Waiver Request of P.L. 94-437 Lease Authority
Headquarters West Programs
Page 2

Also attached is a copy of a memo dated November 30, 1982, in reference to other realty considerations in which IHS may be confronted.

We would appreciate your earliest consideration and status reply on each of these requests. Should you require additional information, please contact this office.

/s/

John T. Shopteese

Attachments

cc: H. C. Townsley, MD - Acting Program Coordinator, Headquarters West
Dr. Rhoades, Director, Indian Health Service
Dr. Todd, Division of Program Operations ✓

January 28, 1983

Real Property Officer, FMB-FEMO

Waiver Request of P.L. 94-437 Lease Authority
Headquarters West

Associate Director for Administration

Thru: Chief, Facility Management Branch
Facility & Equipment Management Office

In developing the Headquarters West Program, initial office space requirements were satisfied by negotiating leases with the All Indian Pueblo Cultural Center under the provisions of the Indian Health Care Improvement Act, Section 704, P.L. 94-437.

The authority for P.L. 94-437 has since been determined for use only with functions related to Direct Health Care of Indian Health Service restricting usage of this authority for Special Purpose Space only (i.e., clinics, hospitals, labs, etc.). We have, therefore, been informed that this does not include office space.

The Headquarters West Programs are very much in favor of retaining the existing leases, however, we feel that prior to extending any commitments, a legal determination is requested indicating that IHS is within the purview of Section 704, P.L. 94-437 - or otherwise granting a waiver from the Special Purpose Space criteria. The All Indian Pueblo Cultural Center has favor on this revenue and service to maintain the Cultural Center as a management endeavor of the 19 Pueblos of New Mexico.

On initial lease with AIPC, the IHS had not been issued restrictions to negotiate space with the Tribe. To cancel the existing leases may jeopardize existing rapport with the AIPC and may not be cost-effective to solicit outside private space at this time.

The following programs are currently located in this space:

1. Alcoholism Program Jan 83
2. Health Records Jan 30, 1983
3. Indian Children's Program Jan 83
4. Mental Health Jan 83
5. Headquarters West Administrative Staff Jan 83

The DHEHS ROFEC, Dallas VI, informs us that there is approximately 10,365 sq.ft. of office space being leased at an annual cost of approximately \$85,402. These leases have been amended by ROFEC VI to various months in FY 1983, with 60-90 day cancellation clauses.

Handwritten notes:
Tribal
Saward
Do you have
any change
on this
not sure why
we would be lost
if they are going
to be removed
at some point
in time.
Total 24
by who

Handwritten note:
Special purpose space.
Jan 1983

memorandum

DATE: January 28, 1983

REPLY TO
ATTN OF: Real Property Officer, FMB-FEMOSUBJECT: Waiver Request of P.L. 94-437 Lease Authority
Headquarters West

TO: Associate Director for Administration

Thru: Chief, Facility Management Branch *RWD*
Facility & Equipment Management Office

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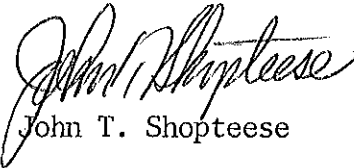
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Waiver Request of P.L. 94-437 Lease Authority
Headquarters West Programs
Page 2

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John T. Shopteese

Attachments

cc: H. C. Townsley, MD - Acting Program Coordinator, Headquarters West
Dr. Rhoades, Director, Indian Health Service
Dr. Todd, Division of Program Operations

memorandum

DATE: November 30, 1982

REPLY TO
ATTN OF: Real Property Officer, FMB - FEMO

SUBJECT: Executive Order 12348, Payment for Transfer of Excess
Real Property to Other Agencies

TO:
Associate Director for Administration

Attn: Office of Legislation

Thru: Chief, Facility Management Branch
Facility & Equipment Management Office

The Real Property Review Board (PRB), established by the subject Executive Order, established a policy that real property transferred between Federal Departments and Agencies will require payment by the receiving Department or Agency of 100 percent of the Fair Market Value (FMV) of the property.

Any deviation from this policy may be allowed only after certification by the Secretary as to need for such deviation and that payment of less than 100 percent FMV would not be counter to the objectives of Executive Order 12348. The unavailability of funds alone is not sufficient to justify an exception.

The Executive Order primarily mandates the continuing utilization of all facilities to the maximum by Federal Agencies.

The policy of the PRB causes some concerns on the impact of existing authorities, Public Laws, and IHS Legislative policies as to program use of IHS facilities in providing medical services and program functions. Although some facilities are not directly used 100 percent by IHS, Legislation as PL 93-638 may permit Tribal entities to carry out such functions in performance of contracts and/or grants of IHS Programs, while occupying such Federal facilities.

On replacement of older hospitals with new Federal or Tribally constructed facilities, IHS has previously retransferred existing old facilities back to the Bureau of Indian Affairs in accordance with the "Memorandum of Understanding" between BIA and IHS. If tribes had interest in the old facility, the Bureau would simply hold the property in trust for the tribes for their use. We are verbally informed that such transfer must now be in conformance with E.O. 12348, indicating that BIA must now reimburse IHS the Fair Market Value of facilities so transferred.

Although such transfer would be supported by appropriate documentation for the deviation provisions of the E.O. on a case by case basis, it would save time, manpower, and indirect cost if IHS is recognized with the "Memorandum of Understanding" exception and other existing authorities in such actions, or provided a "blanket waiver" if such facilities would be for use by tribes in carrying out functions of IHS as indicated by PL 93-638.

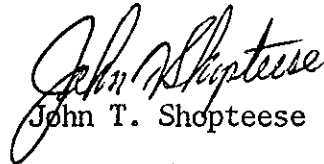
In certain situations, other legislation provides exceptions to the Federal Regulations as P.L. 93-599, which amended the Federal Property and Administrative Services Act of 1949, to provide for disposal of certain excess facilities directly to the Secretary of Interior, to be held in trust for Tribal use. There are conditions, of course, with which these exceptional provisions apply and which IHS takes into consideration while maintaining compliance of other authorities as the Memorandum of Understanding.

In view of Executive Order 12348, establishing the Real Property Review Board policies as to utilization and excessing real estate within which IHS is the controlling Agency, and the requirement of the Secretary's concurrence of such action, would it be within program consideration for an IHS waiver to such provisions which, as we interpret, supercede conveyence procedures such as:

- A. Transfer real property to and from the Bureau of Indian Affairs (Memorandum of Understanding), Delegations of Authority, No. 396 of May 3, 1961, (26 F.R. 4029) as set forth in FPMR 101-47.604.
- B. P.L. 93-599 - Facilities transferred to the Department of the Interior in accordance with Section 202(a)(2) Federal Property and Administrative Services Act of 1949, to be held in trust for an Indian Tribe. FEC Manual HHS CH 3-355, HHS Transmittal 81, (CH 3-370 - Sec. 20).
- C. P.L. 93-638, Sec. 106 (e) permits Tribal organizations to utilize Federal facilities in carrying out such functions related to a contract or grant. In such case, a report of 100 percent use of an old hospital and IHS program may not be directly in use by IHS staff, but the facility is indirectly in use for program functions through such grant or contract.
- D. P.L. 94-437, Sec. 704, permits direct leasing with Tribal entities up to 20 years at the discretion of the Secretary. Under this provision, several clinics are leased from Tribal governing bodies in isolated locations where clinical functions may be limited to one or two days per week. This is not an indication that such a facility is underutilized but while in actual occupancy, is used 100 percent. The need to retain this type of leased occupancy is necessary to reach the otherwise isolated communities which cannot travel to existing hospitals or clinics which are in full-time operation.

We would appreciate an opinion as to the interpretation of Executive Order 12348 and the policies of the Real Property Review Board as they apply to the above existing policies, and if in fact, they have been superceded by such implementation.

Your earliest consideration would be appreciated.


John T. Shopteese

Attachments

cc: Director, Indian Health Service
Richard McCloskey, Director
Office of Legislation & Regulations, Rm 6A-20
Director, Division of Health Facilities & Planning
HRSA, Rm 18-42

January 28, 1983

Real Property Officer, FMB-FBMO

Waiver Request of P.L. 94-437 Lease Authority
Headquarters West

Associate Director for Administration

Thru: Chief, Facility Management Branch
Facility & Equipment Management Office

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Waiver Request of P.L. 94-437 Lease Authority
Headquarters West Programs
Page 2

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Attachments

cc: H. C. Townsley, MD - Acting Program Coordinator, Headquarters West ✓
Dr. Rhoades, Director, Indian Health Service
Dr. Todd, Division of Program Operations

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY

TO : Richard McCloskey, Director
Office of Legislation & Regulations
Service

DATE: APR 19 1979

FROM : Henry H. Pike, Special Assistant
Business and Administrative Law Division

Henry H. Pike

SUBJECT: Leases with Indian Tribes under Section 704 of P.L. 94-437

By memorandum dated February 7, 1979, to Duke McCloud, who referred it to me, you inquired whether section 704 of the Indian Health Care Improvement Act (P.L. 94-437) provides authority for the leasing of property to Indian tribes in addition to authority to lease property from Indian tribes. Section 704 provides as follows:

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Page 2 -- Richard McCloskey

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No opinion is expressed on the case prompting your inquiry inasmuch as, as you state, it is not clear whether the property in question is held by IHS. It is noted, however, that section 4(d) of the Indian Health Care Improvement Act specifically defines an "Indian tribe" to include an Alaska native village.

cc: Duke McCloud
Ian K. Burgess
Glynn Corry
Stephanie Weldon
Jim Miles, Region X

MAY 17 1982

Our Ref: GC:RA:V
RASC 82/19Office of the Regional Attorney
Chicago, Illinois

Red Lake Housing Lease - #ER-6-063

Donald D. Boyle
Director, ROFEC
Region V

This is with reference to your April 1, 1982 memorandum pertaining to the Indian Health Service lease of 39 housing units from the Red Lake Band of Chippewa Indians at Red Lake, Minnesota.

Red Lake is a Federal Indian Reservation established by the treaties of October 2, 1863 (13 Stat. 657) and April 12, 1864 (13 Stat. 689), and the Act of January 14, 1889 (25 Stat. 642). Sections 16 and 17 of the Indian Reorganization Act of 1934, 25 U.S.C.A. 5476-477, gave Indian tribes the authority to enter into leases up to ten years upon the approval of the tribe. The Red Lake Band of Chippewa Indians voted to accept the provisions of the Indian Reorganization Act within two years after its passage. 1/

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Notwithstanding any other provision of law, the Secretary is authorized, in carrying out the purposes of this Act, to enter into leases with Indian tribes for periods not in excess of twenty years. 2/

1/ This information was furnished by Patricia Simons, Tribal Relations Specialist, Division of Tribal Government Services, Bureau of Indian Affairs, Department of Interior, Washington, D.C.

2/ Section 6(a) of Public Law 94-537 added a provision to 25 U.S.C.A. 51674 that property leased by the Secretary from an Indian tribe may be reconstructed or renovated by the Secretary pursuant to an agreement with such Indian tribe.

MAY 17 1982

Page 2

Donald D. Boyle
Director, ROFEC
Region V

This section is the legal basis for entering into leases for staff housing under section 301(b)(3) of the Act, 25 U.S.C.A. §1631(b)(3).

The Indian Health Service leased the housing units from December 15, 1980 to June 15, 1981, with an option for a six-month extension upon 30 days notice prior to the end of the original lease term for "a nominal payment of \$1.00 per year." Paragraph 6F of the lease stated that the "Government shall provide all maintenance, repair and upkeep of buildings and property." A lease renewal notice to extend the lease was not issued by your office until July 29, 1981. The Tribe had presented a proposed lease to the Indian Health Service which was forwarded to your office on July 1, 1981, but was unsatisfactory. Negotiations continued until February 4, 1982 when your office reached a tentative agreement for an annual rental of \$108,545 retroactive to December 18, 1981 subject to Indian Health Service concurrence.

On February 24, 1982, the Red Lake Band of Chippewa Indians passed a resolution stating, in part:

"BE IT FURTHER RESOLVED, that the Indian Health Service pay to the Red Lake Band of Chippewa Indians all monies collected for rent from June 16, 1981 to December 18, 1981 for the time that these facilities were used without any proper authorization from the Tribe.

Your office indicated that the Indian Health Service has picked up all costs related to the property from June 16, 1981 to December 18, 1981 except for one individual responsible for checking renters in and out. However, the proposed new lease was negotiated with the provision that the Tribe will do all the maintenance and management work. We understand that the Tribe has already paid the \$18,653 insurance premium.

The initial question is whether there is any legal liability for the period June 16, 1981 through December 15, 1981, and, if so, the amount of such liability. That determination depends, in part, on what law is applicable. The question of the appropriate law to be applied was addressed in United States v. Forness, 125 F.2d 923 (2nd Cir., 1942), cert. den. City of Salamanca v. United States, 62 S. Ct. 1293, 316 U.S. 694 (1942), a case involving a suit by the United States on behalf of the Seneca Nation of Indians to enforce the Nation's cancellation of a lease for nonpayment of rent upon lands in the City of Salamanca, New York. The Court stated at 125 F.2d 932 that state law "cannot be invoked to limit the rights in lands granted by the United States to the Indians because . . . state law does not apply to the Indians except so far as the United States has given its consent." The court determined that it must

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look to the "common law" for a determination of the dispute and in so doing applied the legal rules as to landlord and tenant which comported with the Congressional intent concerning the Seneca Nation. Id. 125 F.2d at 937, 938.

In the absence of a statute to the contrary, a presumption generally arises that a holding over by a tenant effects a renewal of the lease as to the tenant on the same terms as the original lease. 510 C.J.S. Landlord and Tenant, §73 (1959). Unless otherwise provided by statute, where a tenant under a lease for a definite term holds over his term without a new agreement, the landlord may either treat him as a tenant or turn him out as a trespasser. C. Moynihan, Introduction to the Law of Real Property (1962). Here, the Tribe clearly treated the Indian Health Service as a tenant. The action of the Tribe constituted a renewal of the lease from June 16, 1981 through December 15, 1981 on the same terms as the original lease from December 15, 1980 to June 15, 1981. Thus, we conclude that the Government is liable for six months rent or fifty cents of the annual dollar rental charge.

A second question that should be considered is what extra-legal factors, if any, should be taken into account when ascertaining the amount to be paid to the Tribe for the six-month period beginning June 16, 1981. The Court in Forness at 125 F.2d 941 noted that "the dealings of certain of our citizens with the Indians have often been far from praiseworthy" and "federal courts usually, unless precluded by complete want of power, have done what they could to prevent unfairness to Indians." Of course, the Indian Health Service would want to avoid a public outcry similar to that emanating from the purchase of Manhattan Island from the Indians in 1625 for trinkets valued at \$24.

There are statutory, regulatory, and agency guidelines governing a contracting officer's responsibilities in negotiating leases. It is the contracting officer's duty to "acquire property and services . . . at the lowest reasonable cost" while "promoting fair dealing and equitable relationships among the parties in Government contracting." 41 U.S.C. §401(2), (12). When negotiating a lease, the contracting officer should acquire space "on the basis most favorable to the Government, with due consideration to maintenance and operational efficiency, and only at charges consistent with prevailing scales in the community for comparable facilities." 41 C.F.R. §101-13.100(b) (1981). The GSA Handbook, Acquisition of Leasehold Interests in Real Property (PSSP 1600.1), summarizes the permissible rentals for property leased by the Government. Cf. RA VIII (Knoll) to ROFEC (Moore), Leasing and Bonding IHS Projects, 5/7/77. However, the Regulations state that even a total rental of \$1.00 per year can legally be negotiated if it can be determined that such a price is fair and reasonable. See 41 C.F.R. §101-13.100(a) (1981).

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A number of factors appear relevant in your determination of whether to pay the Tribe a sum in excess of fifty cents for the period June 16, 1981 through December 15, 1981. The Indian Health Service absorbed all costs related to the property except for an individual responsible for checking renters in and out. The lease specified that the Government was to provide all maintenance, repair, and upkeep of the buildings and property. Although the rent was increased from \$1.00 to \$108,545 per year, the increase reflects the Tribe's agreement to provide the maintenance, repair, and upkeep of the buildings and property. Moreover, the entire project was for the sole benefit of improving Indian health and not providing a windfall rental profit to the Tribe. Accordingly, we suggest that it would be fair to pay an additional rental for the June 16 - December 15, 1981 period that would cover the fair and reasonable cost of the individual responsible for checking renters in and out.

If you have any questions or we can be of any additional assistance, please contact us.

Donna Morros Weinstein
Regional Attorney

By
Edward L. Koven
Assistant Regional Attorney

BCC: 2 - GC(BAL) Div. /
2 - GC(PHS) Div. /
Attn: Duke McCloud

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EDUCATION AND WELFARE WASH DC

TO RUEVDKW/1/REGL OFC FOR JOHN F BEAN PRO BOSTON MA

RUEVDKY/1/REGL OFC FOR CESAR A PERALES PRO NEW YORK NY

RUEVEFW/1/REGL OFC FOR JAMES F MELLODY PRO PHILADELPHIA PA

RUEVOLS/1/REGL OFC FOR SARA V CRAIG PRO ATLANTA GA

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MLHM/1/REGL OFC FOR DAN REED ACTING PRO DALLAS TX

ALHL/1/REGL OFC FOR JAMES BERGFALK PRO KANSAS CITY MO

RUWLRFR/1/REGL OFC FOR WELLINGTON E WEBB PRO DENVER CO

RUWLRFS/1/REGL OFC FOR MICHAEL W MURRAY PRO SAN FRANCISCO CA

TO RUWLSBL/1/REGL OFC FOR BERNARD E KELLY PRO SEATTLE WA

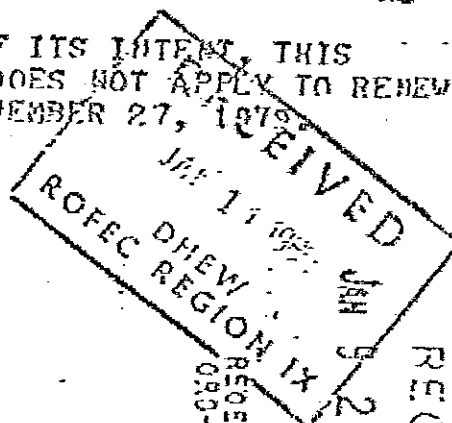
BT
SUBJECT: LEASING REAL PROPERTY FOR IHS USE.

P.L. 96-126 PRECLUDES LEASE OF PERMANENT STRUCTURES FROM FUNDS
APPROPRIATED TO IHS UNDER THIS ACT WITHOUT ADVANCE APPROVAL OF
CONGRESS. ACCORDINGLY, NO LEASES OF PERMANENT STRUCTURES SHALL BE
NEGOTIATED UNDER AUTHORITY OF P.L. 94-437 OR UNDER ANY OTHER SUCH
AUTHORITY PREVIOUSLY REDELEGATED BY ME TO THE PRINCIPAL REGIONAL
OFFICIALS.

PENDING FURTHER CLARIFICATION BY CONGRESS OF ITS INTENT, THIS
INSTRUCTION APPLIES ONLY TO NEW LEASES. IT DOES NOT APPLY TO RENEWAL
OF LEASES ORIGINALLY CONSUMMATED PRIOR TO NOVEMBER 27, 1978.

BT

EXECUTIVE SECRETARIAT
ACTION
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MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE
HEALTH SERVICES ADMINISTRATION
INDIAN HEALTH SERVICE

ALL AREA/PROGRAM DIRECTORS
INDIAN HEALTH SERVICE

DATE: FEB - 6 1980

FROM : Deputy Director
Indian Health Service

SUBJECT: Space Acquisition

The Committee on Appropriations stated its concern of authorities for IHS leasing and has further directed the Director, Indian Health Service, to cease leasing of space considered to be expansion leasing, except that space which will house Congressionally approved expanded programs by specifically stating the terms in the appropriations language. Specifically, leasing negotiations shall not be undertaken until the Congress has approved the program and/or the lease.

Congress has further defined the P.L. 94-437 as authorizing leasing for special purpose space only. Meaning administrative space shall not be acquired under provisions of P.L. 94-437. Administrative space can only be acquired through the IHS construction program, through the GSA Assigned Space procedures, Nominal Rent or Use Permit.

Acquisition of any type lease/contract real property space shall be fully justified using Standard Form 81, GSA Form 1467, the IHS Form Letter, Subject; Space Utilization Analysis and a cost analysis of IHS construction cost as opposed to lease cost. These completed forms will be submitted to the Facilities Management Branch, IHS Headquarters, Albuquerque Office, for review and utilization analysis and will require further processing to the Deputy Director, Indian Health Service, for approval/disapproval. In some instances the request for space may require approval by the Congress.

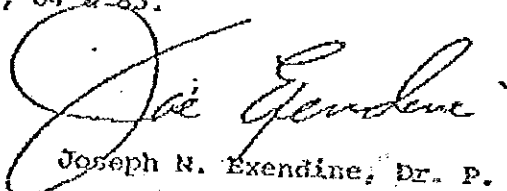
Acquisition of house trailers and/or prefabricated/preengineered buildings shall not be accomplished until further notice from the Deputy Director, Indian Health Service. Moving/placing house trailers (dental trailers) and/or erecting/dismantling prefabricated/preengineered buildings shall not be accomplished without submitting a request through Facilities Management Branch and written approval by this office.

The definitions and direction by Congress will cause the Indian Health Service to become more detailed in planning for real property space requirements and utilization. There is a definite need for an IHS Long-Range Space Requirement Plan. Therefore, request that Area/Program Directors provide to the Facilities Management Branch, IHS Headquarters, Albuquerque Office, no later than COB February 25, 1980, the following space requirements, in addition to the existing inventory:

Rec'd 2/14/80
FMB

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1. Real Property Space under request (except IHS construction program) or negotiations of any type by: location, function, square footage, annual cost, the intended lessor and tenure of lease.
2. Owned space requirements (in addition to existing inventory and that approved in the Long-Range Construction Plan), functions to be housed, location, square footage required and method by which you hope to acquire the building(s) such as transfer, donation, purchase, or IHS construction program. Must be stated for FY-81, 82, 83, 84 & 85.
3. GSA Assigned Space requirements by: Location, function to be housed, required square footage, estimated cost/SF/year and anticipated number of years required. Must be stated for FY-81, 82, 83, 84 & 85.
4. DHEW Leased Space requirements by: location, function to be housed, (can only be special purpose space) estimated square footage (less than 2,500 square feet and less than one year) and estimated cost. Must be stated for FY-81, 82, 83, 84 and 85.
5. Public Law 94-437 Provisions Space Requirement by: location, function to be housed, (cannot be administrative space) if quarters, state number and square footage of each, other type space, estimated total square footage, estimated cost per year, and number of years required. Must be stated for FY-81, 82, 83, 84 and 85.
6. Nominal Rent Space (cost no more and no less than \$1.00 per year) requirements by: location, function to be supported, estimated square footage, (land to nearest 1/100 acre) or other measure and units of measure. Must be stated for FY-81, 82, 83, 84 and 85.
7. Use permit Space Requirements by: location, function to be housed, estimated square footage and from whom permitted.
8. House trailers (include clinical trailers) and preengineered building (even though the moratorium may still be in effect) by location, function to be housed, number of each, square footage of each, estimated cost to acquire for each, anticipated number of years usage for each. Must be stated for FY-81, 82, 83, 84 & 85.



Joseph N. Exendine, Dr. P. H.

cc: Chief, Facilities Management Branch